No. 20193

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

OMPANIA NAVIERA DE BAJA CALIFORNIA,	)
. A.,	)
Appellant - Defendant and Third Party Plaintiff,	)
vs.	)
ERNARD A. NORIEGA,	)
Appellee - Plaintiff,	)
vs.	)
RESCENT WHARF & WAREHOUSE COMPANY,	)
corporation,	)
Appellant - Third Party Defendant.	)

REPLY BRIEF OF APPELLANT

COMPANIA NAVIERA DE BAJA CALIFORNIA, S. A.

OVERTON, LYMAN & PRINCE

Attorneys for COMPANIA NAVIERA
DE BAJA CALIFORNIA, S. A.

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COUNTER-STATEMENT OF THE CASE

Appellee COMPANIA NAVIERA DE BAJA CALIFORNIA, S. A., hereinafter referred to as "COMPANIA", has set forth the background facts in some detail in subparagraph b entitled "The Material Facts" of its Statement of the Case on pages 2-4 of its opening brief in the appeal in the case between COMPANIA and BERNARD A. NORIEGA, hereinafter referred to as "NORIEGA".

CRESCENT WHARF & WAREHOUSE COMPANY, hereinafter referred to as "CRESCENT", undertook to load brick into one of the holds of the "SAN LUCIANO" during a call to Los Angeles in April 1963. CRESCENT held itself out as a professional, experienced and carefull stevedoring company. CRESCENT was not only a professional stevedoring company, but more importantly had handled the "SAN LUCIANO" on dozens of previous occasions. It determined what equipment and supplies would be used. It determined what men and how many should be used and the amount of supervision they should have. It determined in what manner the ship would be loaded and how its gear should be rigged. I so rigged the gear that the blacksmith or sling, as it is sometimes called, came in contact with a strongback socket creating a hazard. As a consequence the socket was bent and had to be repaired. Work was stopped for a brief interval whi repairs were effected. Notwithstanding this experience and knowledge supposedly gained from it, CRESCENT resumed work

after repairs were effected without making a single change in its method of operation or equipment used. As a result of continued contact with the socket, it was ultimately dislodged and a piece struck the head of NORIEGA, who was working below as an employee of CRESCENT.

COMPANIA denies the following assertions of CRESCENT in its opening brief in the appeal of the action against it for indemnity.

FACTS MISSTATED BY CRESCENT

(1) It is not true that as loads descended into the hatch that "the gear had to come in contact with a flange" (CRESCENT'S Brief Page 3);

(2) It is not true that:

"it was necessary and unavoidable that the yard fall would rub against the edges of the coaming" (CRESCENT'S Brief Page 3);

(3) It is not true that:

"the only manner in which the load could have been brought in without capsizing and hitting the shaft alley was the method being used by the longshoremen" (CRESCENT'S Brief Page 3);

As the court below stated:

"The court is satisfied that there were undoubtedl other methods of loading which could have been employe with the flange in place, although they may have been

The court's statement is substantiated by the fact CRESCENT had safely worked this ship and the same hold on dozens of prior occasions.

BY MR. LARSON:

Q Would you state your full name and occupation, Mr. Hansen?

A Norman Knute Hansen, ship boss and hatch boss for Crescent Wharf Company.

Q How long have you held that position with that Company?

A Ten years, sir.

Q Were you so employed as hatch boss on April 18, 1963, in connection with the loading of the SAN LUCIANO?

A I was, sir.

Q Had you worked that ship before this occasion?

A Dozens of times.

Q Had you worked in the particular hold before?

A I had. (Tr. Page 47, Line 20 through Page 48, Line 7) [Emphasis added]

Q Did you go on board that ship at about eight o'clo on April 18th?

A That's correct, sir.

Q What did you do when you first went on board?

A Well, we rigged the ship gear. On this occasion

we rigged the ship gear for number three hatch starboard tank inshore side, and I had worked the hatch several times before, so I knew just about the exact spot where the ship booms should be rigged. (Tr. Page 48, Lines 11-19) [Emphasis added]

(4) CRESCENT'S statement "there was nothing on the gear which caught the flange at the time of the accident" is inconsistent with the remaining portion of the same sentence which states:

"the only contact was the usual one of dragging and rubbing the blacksmith and the wires across the coaming" (CRESCENT'S Brief Page 4)

FACTS OMITTED BY CRESCENT

CRESCENT'S statement of the case omits the following:

(1) After the socket was fixed CRESCENT was on notice that the socket would bend out by the scrapping and the dragging of its gear over it;

(2) After the original damage was repaired, CRESCENT continued to load as it had before the temporary halt in operations. CRESCENT repeated the same process that originally bent the socket out;

(3) After the socket was fixed there was no change in the rigging or procedures used by CRESCENT;

(4) There was no attempt by CRESCENT to avoid the danger of bending or breaking the socket by preventing the gear from dragging and rubbing across it; and

(5) The accident was caused not by faulty repair by COMPANIA but by CRESCENT'S subsequent negligent dragging of the gear over the socket.

ARGUMENT

I. The findings that CRESCENT was negligent and breached its warranty of workmanlike service are amply supported by the evidence. Said findings are not "clearly erroneous" and may not be set aside;

II. COMPANIA did not breach its implied-in-fact obligations owed to CRESCENT and is not guilty of conduct sufficient to preclude recovery in indemnity.

III. Even assuming COMPANIA breached its implied-in-fact obligations owed to CRESCENT, CRESCENT waived the breach within the meaning of the rule of Hugev v. Dampski, 170 F. Supp. 601 (S.D. Cal. 1959); affrmd. 274 F. 2d 875 (9th Cir. 1960);

IV. Indemnity is precluded only if the shipowner unreasonably

or materially hinders, delays or actively interferes with the performance of the stevedoring operations.

I

THE FINDINGS THAT CRESCENT WAS NEGLIGENT AND BREACHED ITS WARRANTY OF WORKMANLIKE SERVICE ARE AMPLY SUPPORTED BY THE EVIDENCE. SAID FINDINGS ARE NOT "CLEARLY ERRONEOUS" AND MAY NOT BE SET ASIDE.

The rules applicable to appeals in admiralty were recently stated in Knox v. United States Lines, Co., 320 F. 2d 247 (3rd Cir. 1963) at 249:

> "The sole issue for our decision is whether the Trial Court's finding of fact were 'clearly erroneous' under the rule of McAllister v. United States . . . 'Under this rule an appellate court cannot upset a trial court's factual findings unless it "is left with the definite and firm conviction that a mistake has been committed".'"

See also:

Griffith v. Gardner, 196 F. 2d 698 (9th Cir. 1952); Rogers v. Pacific Atlantic S.S. Co., 170 F. 2d 30 (9th Cir. 1948).

Furthermore, a finding as to negligence,[1]

[1]CRESCENT attacks as error Finding of Fact No. 5 that states it negligently allowed the gear to strike a metal flange on the vessel.

Ramos v. Matson Navigation Co., 318 F. 2d 128 (9th Cir. 1963), and a stevedoring company's breach of warranty of workmanlike service,[2] Crumady v. Joachim Hendrik Fisser, 358 U.S. 423, 3 L.Ed. 2d 413 (1959) are "findings of fact" within the "clearly erroneous" rule. The only question here, therefore, in affirming the judgment of indemnity is whether there is support in the record for the findings under attack which state CRESCENT was negligent and breached its implied obligations to perform its stevedoring services in a workmanlike manner. COMPANIA submits that CRESCENT'S allowing the loading gear to drag and scrape a socket, which had already been once bent out by the same process, is ample support for the findings of negligence and breach of the warranty of workmanlike performance of the stevedoring operations by CRESCENT. By the simple expedient of either raising or lowering the booms the blacksmith or bridle would have landed either forward or aft of the socket. CRESCENT chose to rely on chance.

II

COMPANIA DID NOT BREACH ITS IMPLIED-IN-FACT OBLIGATIONS OWED TO CRESCENT AND IS NOT GUILTY OF CONDUCT SUFFICIENT TO PRECLUDE RECOVERY IN INDEMNITY.

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[2] CRESCENT attacks as error Finding of Fact No. 11 that states it breached its warranty of workmanlike services.

reasonably expect to encounter, arising from the hazards of the ship's service or otherwise, will be able by the exercise of ordinary care under the circumstances to load or discharge the cargo, as the case may be, in a workmanlike manner and with reasonable safety to persons and property"; and

(2) "to give the stevedoring contractor reasonable warning of the existence of any latent or hidden danger which has not been remedied and is not usually encountered or reasonably to be expected by an expert and experienced stevedoring company in the performance of the stevedoring work aboard the ship, if the shipowner actually knows or, in the exercise of ordinary care under the circumstances, should know of the existence of such danger, and the danger is one which the shipowner should reasonably expect a stevedoring contractor to encounter in the performance of the stevedoring contract"; and

(3) ". . . not unreasonably or materially to hinder, delay or interfere with performance of the stevedoring operations."

Obligation one was obviously met. The only part of

worked this hold on numerous occasions that there was no safe method of loading at 11:20 A.M. on April 18, 1963.

Obligation two is not applicable to this case since the socket was not a "latent or hidden danger". CRESCENT could hardly have been better advised of the existence and precise location of the socket.

Obligation three was also obviously met. The ship did not "hinder, delay or interfere with performance of the stevedoring operations". The Hugev case itself, where the mate authorized continued stevedoring operations in the face of a misplaced queen beam, was a stronger case for hindrance than our case where the ship's crew fixed the bent socket to the stevedoring company's satisfaction to the extent it "looked perfect". And in Hugev the court found no hindrance. There certainly was none here. The evidence would indicate that CRESCENT completely dominated the entire operation.

As pointed out in Italia Societa Per Zioni Di Navigazione v. Oregon Stevedoring Co., 376 U.S. 315, 323; 11 L.Ed. 2d 732, 740 (1964):

> "The shipowner defers to the qualification of the stevedoring contractor in the selection and use of equipment and relies on the competency of the Stevedoring Company."

III

EVEN ASSUMING COMPANIA BREACHED ITS IMPLIED-IN-FACT

OBLIGATIONS OWED TO CRESCENT, CRESCENT WAIVED THE BREACH WITHIN THE MEANING OF THE RULE OF HUGEV v. DAMPSKI, 170 F. Supp. 601 (S.D.Cal. 1959); affrmd. 274 F. 2d 875 (9th Cir. 1960).

Hugev, it should be noted, granted indemnity where the stevedoring contractor had called to the shipowner's attention a misplaced queen beam which caused the hatch boards to wobble. The ship's foreman ordered the stevedoring work halted, complained of the condition to the ship's mate; the mate made an inspection and authorized the contractor's foreman to proceed and the stevedoring contractor was engaged in remedying the unseaworthy condition when one of the longshoremen was injured. On these facts the court found at 611:

> "The evidence is not such as to warrant a finding that the shipowner here breached either of these implied-in-fact obligations of the stevedoring contract in any respect.
>
> "Furthermore, if it were assumed arguendo that the misplaced 'queen beam' was a breach by the shipowner, the stevedoring contractor was fully aware of this latent condition prior to plaintiff's injury and nonetheless willingly proceeded with the work despite the known dangerous condition, and hence would be held to have waived the breach."

On appeal the Ninth Circuit agreed with the lower court that the shipowner had not breached any duties it owed the stevedoring company. Having concluded thus, the Ninth Circuit stated "we need not consider" [the stevedoring company's contention] "that it did not waive the shipowner's breach". Respecting the asserted waiver, however, the Ninth Circuit stated at 876-877:

> "We point out, however, that this factual issue [referring to whether there was a waiver] depends upon the court's conclusion as to whether the stevedoring company continued to unload as it had before the temporary halt in operation. There was no change in procedures used, and no attempt to avoid the danger by the use of another method. The evidence fully supports the finding of waiver, were it necessary." [Emphasis added]

COMPANIA submits CRESCENT did precisely what this court in Hugev stated would amount to a waiver of the shipowner's breach.

(1) It continued to load as it had before the temporary halt in operation.

(2) There was no change in procedures used.

(3) There was no attempt to avoid the danger by the use of another method.

(4) The booms remained in the only spot which would allow the blacksmith or bridle to strike the very evident socket.

Hence, even if COMPANIA is guilty of a breach of its implied-in-fact obligations to the stevedoring company which would be sufficient to preclude indemnity, the stevedoring company waived the breach.

IV

INDEMNITY IS PRECLUDED ONLY IF THE SHIPOWNER UNREASONABLY OR MATERIALLY HINDERS, DELAYS OR ACTIVELY INTERFERES WITH THE PERFORMANCE OF THE STEVEDORING OPERATIONS.

COMPANIA urges the court to follow the rule recently formulated by the Second Circuit in Albanese v. N. V. Nederl. Amerik Stoomv. Maats, 346 F. 2d 481 (2nd Cir. 1965) and Mortensen v. A/S Glittre, 348 F. 2d 383 (2nd Cir. 1965).

> "Whatever fault of a shipowner may be said to relieve the stevedore of his duty under the warranty, it seems plain that it must at least prevent or seriously handicap the stevedore in his ability to do a workmanlike job—merely concurrent fault is not enough." Albanese, supra, at 484.
>
> ". . . 'active hindrance' of the contractor in the performance of its contractual duties . . . is required to defeat the indemnification

action." Mortensen, supra, at 385.

CONCLUSION

It seems perfectly evident that the injuries of NORIEGA were due entirely to the operations conducted by CRESCENT. Had CRESCENT not rigged the gear in the manner in which it did, the accident could not have happened. Had CRESCENT either lowered or raised either of the two booms, the point of landing of the respective pallets would have obviously been forward or aft of the position of the strongback socket. This CRESCENT chose not to do, but instead wrecklessly pursued a plan which its own prior experience had shown would lead to difficulty. CRESCENT knew of the location of the socket; it knew that as rigged, its blacksmith or sling had and would continue to come in contact with it; it knew that it had men working below, including NORIEGA. It would have this court hold that notwithstanding the foregoing it proceeded in a careful and workmanlike manner. It would now have this court exonerate it from the consequences of not just an ordinary negligent act, but from the consequences of assuming a known risk, all in breach of its obligation to perform its stevedoring services in a workmanlike manner.

Dated: November 30, 1965.

OVERTON, LYMAN & PRINCE
DAN BRENNAN
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BY _____
Dan Brennan
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CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

Dan Brennan